

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



75-1015

No. 75-1015

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA  
Plaintiff-Appellee,

v.

MARY JEAN ASKEW  
Defendant-Appellant.

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APPELLANT'S BRIEF

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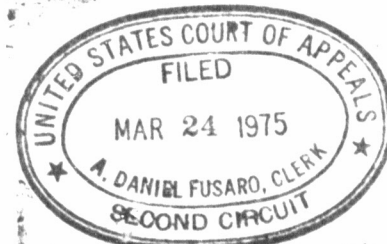
On Appeal from the United States District Court  
for the Western District of New York

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APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

The judgment of conviction herein appealed from was rendered by the Honorable LLOYD F. MAC MAHON, United States District Judge, sitting in the Western District of New York after a trial before a jury.

ISSUES PRESENTED

1) Whether the appellant made a knowing and intelligent waiver of her right to remain silent and right to counsel when she testified before the grand jury.

2) Whether the failure of trial counsel to object to the introduction of evidence of the appellant's statements prevents this court from considering the Miranda issue.

3) Whether the trial court abused its discretion in forbidding trial counsel on cross-examination to inquire to how the Government obtained a handwriting specimen.

4) Whether the sentence of eighteen (18) months of incarceration was excessive.

#### PROCEDURAL SUMMARY

On August 8th, 1973, the appellant, MARY JEAN ASKEW, appeared before a United States Grand Jury impaneled in the Western District of New York. This Grand Jury was investigating violations of Title 18, United States Code, Sections 1001 and 1341 and other offenses against the United States arising out of an alleged scheme to fraudulently obtain unemployment compensation from the State of New York.

After the appellant, Mrs. Askew, testified before the Grand Jury, she was indicted for sixteen (16) counts of perjury before that body in violation of Title 18, United States Code, Section 1623. She was also indicted subsequently, for conspiracy and other federal crimes for her alleged participation in a scheme to defraud the New York State Unemployment Insurance Fund by means of the United States Postal Service. This second indictment is awaiting trial.

On November 11th, 1974 a jury trial of the perjury indictment began before the Honorable LLOYD F. MAC MAHON,

United States District Judge. The appellant was found guilty of the ten (10) counts of perjury left for the jury's consideration; namely, Counts One, Two, Three, Four, Five, Eleven, Twelve, Thirteen, Fourteen and Fifteen. Counts Six through Ten were dismissed on motion of the Government and Count Sixteen was dismissed on motion of the Court sua sponte.

Judge MacMahon sentenced Mrs. Askew to a term of eighteen (18) months in the custody of the Department of Justice on each count, the sentences to run concurrently. A timely notice of appeal to this Court was then filed.

#### STATEMENT OF FACTS

Count One of the indictment alleges that Mrs. Askew perjured herself before the Grand Jury when she denied that she had ever cashed or received unemployment compensation checks payable to one, KATHRYN LEE WILLIS. [A-1] The remaining counts of the indictment for which Mrs. Askew was convicted alleged specific instances where Mrs. Askew perjurally denied receiving or cashing specific unemployment checks payable to KATHRYN LEE WILLIS. [A-2 to 18]

JAMES W. GRABLE, a former Assistant United States Attorney, then in charge of the Grand Jury, testified that he had been conducting an investigation into fraudulent unemployment compensation claims. [R-21, A-22] The Grand Jury had already heard some testimony regarding the fraudulent

claims and according to Mr. Grable, he had focused on a particular area of involvement. [R-47, A-27] Under cross-examination by trial counsel, Mr. Grable, stated that he had spoken with Mrs. Askew prior to her testimony, and that he advised her that anything she said could be used against her. Mrs Askew was also told that if she testified falsely a charge of perjury could be placed against her. [R-48, A-28] The minutes of the Grand Jury proceedings show the actual recitation by Mr. Grable to Mrs. Askew prior to her testimony:

Q. All right. And before I ask you any questions I want to advise you that under the Fifth Amendment of the Constitution you have the right to remain silent during this Grand Jury proceeding. You have the right to refuse to answer any questions which I or the Grand Jury may ask of you which in any way could or would incriminate you. I want you to understand that if you do elect to testify or answer any questions here, anything you say can and will be used against you if incriminating. You have the right to counsel of an attorney. If you cannot afford one, the court will appoint one to advise you in regard to your testimony to this panel. Again, if you do testify here, anything you do say can be used against you. Do you understand your rights?

A. Yes.

Q. All right.

A. I understand them.

Q. All right. Now, do I have your assurance that during the series of questions I am about to ask you and if the Grand Jury asks you any additional questions that if you are unsure of your rights or unsure of the answer that you would take the Fifth Amendment or invoke your Constitutional privilege?

A. Yes. [A-34]

Mr. Grable then testified that Mrs. Askew denied before the Grand Jury that she had received or cashed unemployment checks payable to KATHRYN LEE WILLIS. [R-26 et seq.]

An investigator for the New York Department of Labor showed that 52 unemployment checks for the sum of Seventy-Five (\$75.00) Dollars payable to K. L. WILLIS were mailed to 83 Brunswick Boulevard, Buffalo, New York where Mrs. Askew occupied the lower half of the premises. All the checks had been cashed. [R-60 to 61]

The applications for these unemployment benefits by a person purporting to be KATHRYN LEE WILLIS all showed that the prior employer was a car wash also listing its address at 83 Brunswick Boulevard, Buffalo, New York. [R-58] There is evidence to show that the car wash apparently did not exist. [R-59]

The Government produced ten (10) photographs made by the Regiscope Company which showed pictures of unemployment

compensation checks payable to K. L. WILLIS and pictures of a person who purported to be K. L. WILLIS when the checks were cashed at a local check cashing service. [R-81 to 84] Although Mrs. Askew had denied before the Grand Jury that the photographs were pictures of her, a tenant of Mrs. Askew testified that the person depicted in the photographs was Mrs. Askew. [R-67 to 70]

A United States Postal Inspector testified that he showed a legitimate claim for unemployment benefits to Mrs. Askew, and Mrs. Askew acknowledged that the signature thereon was her own. [R-88 to 90] The Postal Inspector also testified that he watched the appellant make a handwriting exemplar after the Grand Jury directed Mrs. Askew to do so. [R-88]

On cross-examination, the District Court refused to allow trial counsel to ask the Postal Inspector where he had obtained the legitimate claim for benefits. [R-91 to 92, A-31 to 32]

A Government handwriting expert testified that he examined the applications and endorsed checks bearing the signature of KATHRYN LEE WILLIS. The expert also examined the handwriting exemplar provided by Mrs. Askew and her legitimate claim for unemployment benefits which she acknowledged to be hers. The expert concluded that the handwriting on these documents was made by the same person. [R-96 to 98]



ARGUMENT

POINT I

MRS. ASKEW DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF HER MIRANDA RIGHTS BEFORE SHE TESTIFIED TO THE GRAND JURY.

In United States v. Mandujano, 496 F 2d 1050 (5th Cir. 1974), the Court of Appeals for the Fifth Circuit held that a witness before a Grand Jury who is virtually a defendant, is entitled the full panoply of rights prescribed by Miranda v. Arizona, 384 US 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). There can be little dispute that Mrs. Askew was a virtual or putative defendant when she appeared before the Grand Jury.

The Government had admittedly focused on an "area of involvement" when she was subpoenaed. [A-47] The Government was also armed with telling evidence connecting Mrs. Askew to the substantive fraud, namely, photographs purporting to show Mrs. Askew cashing unemployment checks payable to KATHRYN LEE WILLIS. Moreover, Mrs. Askew was in fact indicted for the fraud.

If the "virtual defendant" rule has the strength of its own conviction, it follows that not only must there be a recitation of the Miranda litany, but the witness also must knowingly and intelligently waive the privileges against self-incrimination and the right to counsel. The courts have consistently held that in cases involving in-custody interrogation, the Government has a heavy burden of proving



that the defendant made a knowing and intelligent waiver;  
and furthermore:

"...waiver may not be presumed from a silent record, from silence of the accused after warnings, or from the fact that an accused answers a few questions or gives some information when in-custody interrogation is involved." United States ex. rel. Williams v. Twomey, 467 F 2d 1248, 1251 (7th Cir. 1972), citing Miranda, supra; Escobedo v. Illinois, 378 US 478 (1964); United States v. Jenkins, 440 F 2d 574 (7th Cir. 1971); United States v. Nielsen, 392 F 2d 849 (7th Cir. 1968).

While we do not dispute that the Miranda warnings given Mrs. Askew were adequate on their face, we do argue that the Government has failed to meet their heavy burden in showing voluntary waiver and we argue further that there is not sufficient evidence on the record to show that Mrs. Askew made an intelligent waiver of her rights. Mrs. Askew answered "yes" to a question "Do you understand your rights?" [A-36] But this query was tacked on to a breathless Miranda incantation. Mrs. Askew was not given the opportunity to assess each constitutional right separately, nor was she asked if she waived those rights. From a common sense view at least, the mere understanding of one's constitutional privileges does not mean ipso facto that those privileges are waived.

Moreover, the Assistant United States Attorney did not ask Mrs. Askew whether she wanted to exercise her rights once she said she understood them. She was not

asked, for example, if she wanted to consult with an attorney before she answered.

On the rationale of Mandujano, supra, the trial court should have suppressed from use at trial Mrs. Askew's testimony before the Grand Jury.

POINT II

THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOTICE THE MIRANDA ISSUE AS PLAIN ERROR, EVENTHOUGH IT WAS NOT PRESERVED BELOW.

This Court has recently reiterated that matters not objected to may be considered if they involve plain error affecting substantial rights. United States v. Rose, 500 F 2d 12 (2d Cir. 1974). We believe that the Court should recognize the Miranda question in this case because, like in Mandujano, supra, Mrs. Askew was placed in an extraordinarily unfair position. If Mrs. Askew answered truthfully to the deliberately incisive questions put to her before the Grand Jury, there was a strong likelihood of self-incrimination. If Mrs. Askew denied any wrongdoing, she faced a perjury charge. Under circumstances which approach entrapment, it would seem that Mrs. Askew's Fifth and Sixth Amendment rights should have been punctiliously protected by the Government. As we have claimed, Mrs. Askew was not so protected but rather she was put in a situation so palpably and fundamentally unfair that it casts an iniquitous

shadow on the judicial process.

We urge the Court, therefore, to consider the Miranda issue in this case either under its power to notice plain error under Rule 52 (b) of the Federal Rules of Criminal Procedure, or under its inherent power to consider manifest injustice. United States v. Indiviglio, 352 F 2d 276 (2d Cir. 1965); United States v. O'Connor, 237 F 2d 466 (2d Cir. 1956).

### POINT III

IT WAS A PREJUDICIAL ABUSE OF DISCRETION  
FOR THE TRIAL COURT TO LIMIT CROSS-  
EXAMINATION BY DEFENSE COUNSEL.

It is beyond cavil that the trial judge has broad discretion in determining the permissible scope of cross-examination. United States v. DeMarco, 488 F 2d 828 (2d Cir. 1973). However, it is an abuse of discretion for the trial judge to limit defense counsel when there is a legitimate right to cross-examine. Alford v. United States, 282 US 687, 51 S.Ct. 210, 75 L.Ed. 624 (1931).

In this case, we respectfully submit that the trial judge abused his discretion when he sua sponte forbade trial counsel to inquire into the source of the handwriting specimen on the grounds that the question was immaterial. The specimen was a legitimate claim for unemployment benefits executed by Mrs. Askew, according to the witness offering the specimen. Trial counsel had a legitimate right to look into the authenticity of that document: surely the source

of the specimen would shed some light on the document's authenticity. Moreover, further examination would have allowed the defense to learn whether the specimen had been obtained by means in keeping with the Fourth Amendment proscription against unreasonable searches and seizures.

For these reasons, we urge that this Court find that the trial judge abused his discretion and committed prejudicial error by limiting cross-examination.

#### POINT IV

A SENTENCE OF EIGHTEEN (18) MONTHS OF INCARCERATION WAS EXCESSIVE.

While the sentence imposed by the trial court is less than the maximum possible, we nonetheless submit that it is unnecessarily harsh given all the circumstances. First, this was the first criminal conviction for Mrs. Askew. On this basis alone, it would be excessive to impose such a lengthy period of imprisonment. Second, Mrs. Askew must still face the multi-count indictment for the substantive offenses, which by her denial resulted in this perjury conviction.

It is the second point which we find especially ironic and disquieting. Mrs. Askew was, in essence, convicted and sentenced to eighteen (18) months imprisonment for denying her guilt. In ordinary circumstances it would be repulsive and illegal if a criminally accused were incarcerated merely because of a denial of guilt. What makes Mrs. Askew's

case extraordinary is that the prosecution baited and perhaps entrapped Mrs. Askew into denying the accusations against her when she was a Grand Jury witness. We believe, therefore, that a sentence of eighteen (18) months incarceration is grossly excessive.

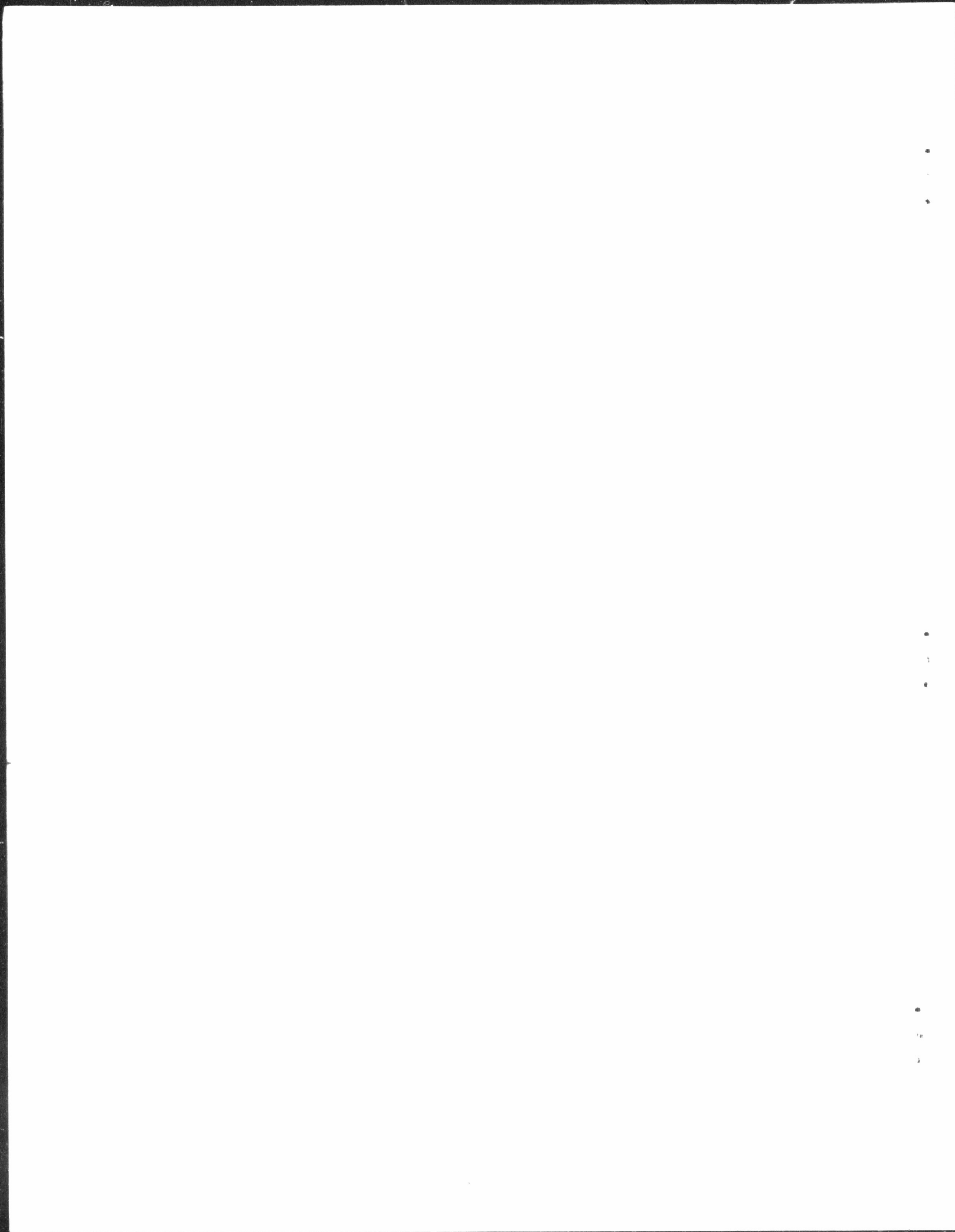
CONCLUSION

The judgment of conviction should be reversed or in the alternative, the sentence imposed should be modified.

Respectfully submitted,

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VINCENT E. DOYLE, JR., ESQ. OF COUNSEL



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UNITED STATES OF AMERICA  
Plaintiff-Appellee

-vs-

Docket No. 75-1015

MARY JEAN ASKEW  
Defendant-Appellant

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STATE OF NEW YORK)  
COUNTY OF ERIE     ) ss:  
CITY OF BUFFALO    )

R. PETER MORROW, III, being duly sworn, deposes and  
says:

I personally served two (2) copies of the appendix  
and appellant's brief upon a representative of the United  
States Attorney for the Western District of New York at the  
Federal Courthouse, Buffalo, New York.



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Sworn to before me this

21st day of March, 1975.



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NOTARY PUBLIC  
My Comm. Expires Sept. 30, 1976